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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CURLEY BARRETT, Defendant and Appellant.	B161047 (Los Angeles County Super. Ct. No. MA023088)

APPEAL from a judgment of the Superior Court of Los Angeles County, Martin L. Herscovitz, Judge. Reversed.

Barbara O'Neill Ferris, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Jaime L. Fuster, Supervising Deputy Attorney General, and Corey J. Robins, Deputy Attorney General, for Plaintiff and Respondent.

Curley Barrett appeals from the judgment entered following his conviction by jury of grand theft of property of a value exceeding $400 (Pen. Code, § 487, subd. (a)). He was placed on formal probation for three years.

In this case, we hold prejudicial prosecutorial misconduct occurred.

FACTUAL SUMMARY

1. *People's Evidence.*

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence, the sufficiency of which is undisputed, established that prior to the year 2000, Anthony Smith (Anthony), a football player for the Oakland Raiders, and his wife Teresa, an attorney, opened a telemarketing business they owned called Collections Management Systems (CMS). The purpose of CMS was to sell debt collection computer software. In August 2000, Anthony and Teresa started a debt collection business called National Recovery Bureau (NRB). Anthony intended that NRB use and promote CMS software. The Smiths purchased the computers, desks, and business supplies for NRB.

In about August 2000, appellant was hired by NRB based on his experience in debt collection. Appellant, but not the Smiths, had experience in starting and running a debt collection company. Appellant was the collections manager at NRB, but he helped start the business and his duties at the beginning included more than merely managing collections. Appellant was also going to help develop CMS software.

At some point, appellant opened bank accounts for the business and listed his name as a signatory on the accounts. Teresa had appellant's name removed as a

signatory. If appellant had been a partner, Teresa would not have been able to remove his name without written authorization from Teresa and appellant. Teresa later told appellant that he was not to sign checks for the business, and appellant replied in the affirmative without protest.

In September 2000, Teresa saw business cards on appellant's desk, and the cards reflected that appellant was CEO of the business. Appellant was also holding himself out as CEO to NRB employees and clients. Teresa had new cards made reflecting that appellant was collections manager, and told appellant that he should use them when he received him. When the new cards came, appellant acknowledged receipt of them, and Teresa did not see him subsequently using the old cards.[1] Teresa occasionally heard appellant tell someone on the telephone that he was the company's CEO, but Anthony later talked to appellant about this.

Teresa testified that in December 2000, NRB was incorporated in California as Debt Detectives, Inc. (DD), doing business as NRB.[2] DD was wholly owned by Anthony. Anthony was president of DD, Teresa was its treasurer and secretary, and the Smiths were its sole corporate officers. The company did not have a chief executive officer. Corporate formation documents did not reflect appellant's name.

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[1] Anthony testified that on one occasion when appellant was employed at NRB, Anthony saw appellant's business cards on appellant's desk, they indicated that appellant was CEO, and Anthony told him that Anthony did not want appellant to indicate on the cards that he was CEO. Appellant was an employee.

[2] At trial, the parties frequently referred to NRB and DD interchangeably.

Appellant was working for NRB prior to the December 2000 incorporation of DD, but he was never a partner in the business. As collections manager, appellant was paid a salary of $5,000 a month from about August 2000 until about April 2001. During that period, NRB was not generating income. Appellant was being paid by NRB, but effectively by the Smiths, since they alone provided funds for NRB.

In January 2001, the Smiths purchased Debt Master debt collection software (DM) for about $7,500 from Comptronics, and began using the software immediately. The Smiths selected DM from a list of three or four software options which appellant had compiled at Teresa's request. When debtors' accounts were inputted into DM via computer, the software would generate collection letters, and would also hold information pertaining to debtors and their accounts. Only the Smiths and Comptronics had a proprietary interest in DM, and no one was authorized to remove DM from NRB's premises. DM had built-in safeguards preventing its use in a computer not on NRB premises, and Teresa did not tell appellant about the safeguards.

Information on DM was backed up every other evening, if not every evening, on a backup disk and a server in the office. If DM ever suffered a system failure in the office computer, NRB would not have been able to continue operations without using DM to reboot the computer.

In January 2001, appellant and a consultant produced an employee handbook for the business, and the handbook indicated that nothing could be taken from the office without the approval of a company officer, that is, Anthony or Teresa. Teresa did not

give appellant permission to take DM from NRB's premises and, prior to August 15, 2001, she did not know he had taken it.

By April 2001, NRB was not generating expected revenues so, that month, NRB stopped paying appellant the above mentioned salary. Appellant was placed on a monthly commission basis until August 2001, when he was terminated.

In July 2001, Amelia Bucher was hired as office manager at NRB to take over Teresa's responsibilities. Teresa authorized appellant to negotiate with an attorney to prepare a legal services agreement between the attorney and DD. After negotiations between appellant and the attorney, the two agreed that the attorney would prepare the agreement. Teresa never spoke with the attorney. Appellant gave Teresa a draft of the agreement dated July 15, 2001. Teresa and appellant were proposed signatories, and the draft listed her as vice-president and appellant as collections manager. In July 2001, appellant submitted his resume to Teresa, because NRB's insurance company wanted background information on the "main collector." Appellant's resume contained his titles at previous jobs, but not his title at NRB.

Partially as a result of appellant's job performance, Bucher, with Teresa's approval, gave to appellant a memorandum of responsibilities dated August 14, 2001, detailing his responsibilities at NRB. Appellant refused to comply with the memorandum. On about August 15, 2001, the Smiths decided that Anthony would meet with appellant the next day and, if he refused to comply with the memorandum, he would be terminated. On August 15, 2001, Teresa told Bucher to change the locks on the business doors, and that appellant was not to get a key. However, the locks were not

changed that evening because Bucher had to leave after 5:00 p.m. and appellant remained alone in the office after Bucher left.

On about August 15 or August 16, 2001, appellant was terminated. Bucher later told Teresa that day that the DM, its backup and update disks, and several client files, were missing. By letter to appellant dated August 18, 2001, Teresa asked appellant to return all files to the office immediately. At the time, Teresa was aware that her software had been taken, but for some reason she omitted reference to the software in the letter. Appellant had no right to remove the software or any other business material from the business.[3] After appellant was terminated, he applied for state unemployment benefits. When he applied, he indicated he was an employee. During the benefits hearing, he testified he was CEO and a partner.

Anthony testified that he would have considered making appellant an equity partner once the business began making money, but it never did. NRB and CMS were doing so badly that Anthony did not see why appellant would have wanted to become a partner. Anthony never conversed with appellant about appellant becoming a partner.[4]

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[3] After August 16, 2001, Teresa determined from the NRB computer that, on August 15, 2001, someone, without authorization, had e-mailed client files and the NRB database from the NRB computer to the personal e-mail addresses of appellant and his son, who had worked at NRB.

[4] Appellant had been a member of a youth football league board and, on one occasion, he cursed at a child and the child's parent. To prevent appellant from being humiliated by a forced resignation, Anthony told the board that appellant had to resign to become a partner with Anthony in a business. Anthony did not tell the board the business to which Anthony was referring, and his statements to the board did not reflect any actual agreement between appellant and Anthony regarding NRB.

Appellant was reimbursed for any money he paid in connection with NRB business expenses.

Appellant never asked Anthony to prepare a contract reflecting that appellant was a partner in NRB or DD. Anthony never told appellant that Anthony did not enter into written contracts and that appellant would have to trust Anthony. Over the years, Anthony had owned various businesses, and he routinely used contracts containing confidentiality and noncompetition clauses. Anthony learned that, when appellant left, there were files missing containing accounts worth over $400,000. No one had permission to take them.

Bucher testified that when she was hired in July 2001, Teresa introduced Bucher at a staff meeting, and appellant was introduced to Bucher as collections manager. However, Bucher heard appellant tell clients that he owned the business. Bucher prepared the August 14, 2001 memorandum of responsibilities for appellant because he would come to work late, drink coffee, and read the newspaper when he should have been making collection calls. Appellant refused to comply with the memorandum and told Bucher that when the Smiths were done with Bucher, Bucher would "be nothing more than a collector too." On August 14, 2001, Bucher had intended to change the locks on NRB's doors, but appellant refused to leave the building. Appellant stated he had work to do, but he was not making collection calls, and was just sitting and walking around. Bucher left and appellant remained alone.

On August 15, 2001, Bucher came to work but appellant did not. Bucher noticed that files were missing. An employee also complained that a file was missing. On

August 16, 2001, Bucher realized that the DM "disk" was "missing." NRB experienced computer problems and, without the disk, debtor information could not be reviewed and collection calls could not be made. Appellant had no right to take the disk, and no one had a right to steal the files. Bucher told a probation officer that appellant "posed himself as the partner or owner of the business." Some of the clients whose files were missing later told Bucher that appellant had contacted them.

On September 10, 2001, Los Angeles County Sheriff's Detective Charles Ingram conducted a search at Total Profit Control (Total), a collection agency where appellant was then an employee. Ingram was looking for the DM and a backup tape. Appellant, at Total, told Ingram that appellant did not know if he had the program and, if he did, it might be in Total or in his house. Ingram and appellant later went to appellant's house. After Ingram entered the house downstairs, but before he started searching, appellant told Ingram that the program Ingram was looking for was probably in appellant's office upstairs. Ingram followed appellant upstairs to the office and, after the two entered the office, appellant pointed to a Tupperware container. Appellant told Ingram that the program was probably in the container. Ingram recovered the DM and backup tape from the container.

After Ingram admonished appellant concerning his *Miranda* rights, appellant stated that the only thing he was going to say was that he legally possessed the items. However, appellant later told Ingram that appellant would talk to Ingram. Ingram asked if appellant had any evidence that appellant was an owner of NRB. Appellant provided a business license application listing him as CEO. Ingram told appellant that evidence that

appellant was a CEO was not evidence that he was an owner. Appellant showed Ingram an unsigned memorandum of understanding. Appellant stated he did not have anything that was signed.

Appellant told Ingram that appellant took the DM and backup tape. Appellant said he often brought them home to work on them because he had obtained the software and was the liaison between NRB and DM's manufacturer. Appellant told Ingram that appellant was a one-third owner of NRB. Appellant showed Ingram various documents, but none demonstrated appellant was a part owner of NRB or had the right to take NRB property home.

2. *Defense Evidence.*

In defense, appellant testified that Anthony, Scott Ford, and appellant agreed that software would be sold and that the proceeds would be split 40%, 40%, and 20%, respectively. Appellant also testified that the "agreement as far as the collection agency was concerned, technically it was all mine." Appellant had asked for a written agreement, but Anthony stated he did business with Ford, made a lot of money, and Anthony and Ford never put agreements in writing but were satisfied with a handshake. Anthony never told appellant that appellant was being hired as an employee. Appellant was going to be in charge of everything, and the "only thing [Anthony] had to bring to the table was, . . . the cash." Appellant did everything necessary to set up the business, and met the mayors of Palmdale and Lancaster to determine a business location.

In about January 2001, appellant learned that DD was incorporating and doing business as NRB, and that Anthony was listing himself as sole stockholder and his wife

as secretary. Appellant spoke with Anthony about this, and Anthony told appellant that Anthony did not want appellant's "name on it" because of potential liability stemming from another matter. However, appellant testified that Anthony told appellant not to worry, everything was fine, it had nothing to do with "our monetary agreement and my interest in the business, . . ." and that "this was simply a title . . . ." At some point, appellant's compensation changed and he received a draft contract which indicated he was an employee working for Anthony. Appellant countered with a draft reflecting he was not an employee. Appellant's draft was given to Anthony, but Anthony never signed it.

After appellant was given the memorandum of responsibilities, and the night before he was terminated, he left NRB's office at about 8:30 p.m. Appellant attempted to e-mail computer files because he had received the memorandum and "something was awry, . . ." However, the attempt was unsuccessful. NRB had seven backup disks, and appellant took the oldest one. The disk contained information concerning amounts owed to clients. Appellant testified that something was "smelling really, really bad, . . ." and appellant took the disk to make sure clients were paid. Appellant also took the disk because he was concerned about his welfare.

Appellant did not take files; copies of files were already at his home. Appellant took work home all the time. As for the DM, once it was installed in the office computer, appellant took the DM home. Appellant testified that "we didn't want to keep the original diskette on the premises[,]" because the office had been flooded twice. Appellant testified that he did not take anything he did not feel he had an "interest in

having," and he felt he owned "part of that property, . . ." Appellant later received a letter from Teresa directing him to return the files, but the letter mentioned nothing about a diskette.[5] During cross-examination, appellant admitted he was "paid with W-2s as an employee, . . ." Appellant reported as income whatever amount was on the W-2 forms.

3. *Rebuttal Evidence.*

In rebuttal, the People introduced into evidence a W-2 form for the tax year 2000 reflecting income to appellant from NRB, and a W-2 form for the tax year 2001 reflecting income to appellant from DD. Appellant received W-2's because he was an employee. DM could not be operated without a key that was to be inserted in the back of a computer server. Appellant was not told about the key.

CONTENTION

Appellant contends that "[t]he prosecutor's highly prejudicial misconduct throughout the trial and constitutionally forbidden comments during closing argument destroyed appellant's defense and require reversal."

DISCUSSION

Appellant claims the trial prosecutor, John Evans, committed prejudicial prosecutorial misconduct. We agree.

Appellant's contention focuses on three categories of alleged prosecutorial misconduct: (1) the prosecutor's comments concerning Kimberly Hill during opening argument; (2) the prosecutor's alleged misrepresentations, during cross-examination of

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[5] Appellant's daughter testified that the software had been at appellant's house for about five or six months.

appellant and during jury argument, that appellant had testified that he "snuck" a disk into his briefcase; and (3) the prosecutor's "improper disparagement and belittlement of defense witnesses."

1. *Preliminary Observations.*

Although appellant did not, as to each alleged instance of prosecutorial misconduct discussed below, make the requisite objection on that ground and request a jury admonition, respondent concedes the issues appellant raises concerning prosecutorial misconduct have not been waived on appeal.[6] Respondent's concession is significant, not merely because it implicitly acknowledges the propriety of our addressing the merits, but because it at least suggests that, on any occasion in which appellant failed to make the requisite objection and request, said objection and/or request would have been *futile*; an admonition *would not have cured the harm*; and/or, because of the immediacy with which *the court* overruled any objection by appellant, he *lacked an opportunity* to make the requisite request. (*People v. Hill* (1998) 17 Cal.4th 800, 820-821 (*Hill*).) We accept respondent's concession.

As to the merits, we evaluate appellant's contention under familiar principles employed to determine whether prejudicial prosecutorial misconduct has occurred. Such

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6 Respondent states in his opening brief, "[r]espondent does not assert appellant waived any of his misconduct claims. He did, in fact, make numerous objections, and it does appear he sufficiently preserved the various claims raised herein for appellate review. (See *People v. Hill* (1998) 17 Cal.4th 800, 819.) Accordingly, respondent addresses the merits of appellant's claims."

principles are enunciated in *Hill*, a case to which the instant one is sadly analogous.[7] In particular, we consider below appellant's three categories of alleged prosecutorial misconduct.

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[7] In *Hill*, our Supreme Court stated, "'The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'" [Citation.]' [Citation.]

"Regarding the scope of permissible prosecutorial argument, we recently noted '"'a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature.' [Citation.] 'A prosecutor may "vigorously argue his case and is not limited to 'Chesterfieldian politeness'" [citation], and he may "use appropriate epithets . . . ."'" [Citation.]' [Citation.]

"Prosecutors, however, are held to an elevated standard of conduct. 'It is the duty of every member of the bar to "maintain the respect due to the courts" and to "abstain from all offensive personality." (Bus. & Prof. Code, § 6068, subds. (b) and (f).) A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state. [Citation.] As the United States Supreme Court has explained, the prosecutor represents "a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." [Citation.] Prosecutors who engage in rude or intemperate behavior, even in response to provocation by opposing counsel, greatly demean the office they hold and the People in whose name they serve. [Citations.]' [Citations.]" (*Hill*, *supra,* 17 Cal.4th at pp. 819-820.) Reversible prosecutorial misconduct need not be committed intentionally or in bad faith. (*Hill*, *supra,* 17 Cal.4th at pp. 822-823.)

2. *The Prosecutor's Jury Arguments Concerning Kimberly Hill.*

a. *Pertinent Facts.*

During the prosecutor's cross-examination of appellant, the prosecutor repeatedly referred to possible testimony from Kimberly Hill, an employee of NRB.[8]

In the first colloquy of jury argument at issue, the prosecutor, during opening argument, commented, "I asked Mr. Barrett some questions about Kimberly Hill and her involvement and about the 58 inches of paper that represented the accounts that were missing. *I didn't need Ms. Kim Hill to talk about him taking those documents because he would have come in and said when I left on the 15th.* [*Sic*.] *I mean the most she could have said* --" (Italics added.) Appellant's counsel objected that the prosecutor "should have brought Kim Hill in if she was going to testify." Appellant's counsel stated, "He can't testify to what Kim Hill would have testified to if she was not brought in here."

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8 The prosecutor's questions and comments were as follows: "Q If Kim Hill comes in here and testifies that's exactly how that file was stored at that business, she would be telling the truth; isn't that true?" "Q So if Kim Hill comes in and testifies that on August 16th when she came in to work the first thing she noticed was that the 36 inches of Ahlgreen paper was gone from your desk, would she be telling the truth?" "Q . . . Now, Kim Hill is also going to tell us that the Dr. Amala file is about one inch, and the American Escape Bail Bonds file was about 11 inches. That makes 12 inches. That's another six of these [reams of paper]." "Q If Kim Hill comes in here and testifies that you said she may end up working for them [Total Profit Control] or be interested in working for them one day, would she be telling the truth?" "Q So if Kim Hill comes in here and testifies that you always keep the Ahlgreen file on your desk and she knows that because it was always in her way physically from retrieving documents, and that was the way and condition you kept that Ahlgreen file and that it was missing when she came to work on August 16th, 2001, your testimony would be you don't know why it was missing?"

The court told the jury, "Ladies and gentlemen of the jury, the arguments are based on the evidence that was presented."

As to the second colloquy at issue, the prosecutor then stated, "Okay. Fine. *But the most Kim Hill could say is I was there on one day and I wasn't there on the next. That's the best I can do.*" (Italics added.) Appellant's counsel stated, "again, he's testifying to the jury -- without her being there." The court replied, "He's referring to the facts of the case. Overruled."

The prosecutor continued his argument without objection. Later, as to the third colloquy, the prosecutor commented without objection concerning missing files, "*But I don't need Kim to say they were there one day and not the next.* (Italics added.) Why? Mr. Ahlgreen said he had them."[9]

b. *Analysis.*

Appellant claims concerning the above that the prosecutor committed misconduct during argument "when he told the jury the absent witness's testimony would have been repetitive. The effect of this argument was to tell the jury that the witness, if called, would have testified exactly as Mr. Ahlgreen did, in a manner favorable to the prosecution."

In *Hill*, our Supreme Court observed that prosecutorial misconduct clearly occurs when, during closing argument, a prosecutor refers to facts not in evidence. (*Hill*, *supra,* 17 Cal.4th at pp. 827-828.) *Hill* explained, "such statements 'tend[] to make the

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9 Ahlgreen was one of the clients whose files appellant allegedly took.

prosecutor his own witness--offering unsworn testimony not subject to cross-examination. It has been recognized that such testimony, "although worthless as a matter of law, can be 'dynamite' to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence." [Citations.]' (*Bolton*, *supra,* 23 Cal.3d at p. 213; *People v. Benson*, *supra,* 52 Cal.3d at p. 794 ['a prosecutor may not go beyond the evidence in his argument to the jury']; [citations]. 'Statements of supposed facts not in evidence . . . are a highly prejudicial form of misconduct, and a frequent basis for reversal.' (5 Witkin & Epstein, *supra,* Trial, § 2901, p. 3550.)" (*Hill*, *supra,* 17 Cal.4th at p. 828.)

Although the prosecutor's comments in the above three challenged colloquies are not models of clarity, those comments implied that, if the prosecutor had called Hill as a witness, she would have testified favorably for the prosecution concerning appellant taking documents; on what day(s) she was or was not present; and on what day(s) files were or were not present. Respondent concedes "the prosecutor did refer to a potential witness and imply she would testify in a particular way . . . in an apparent effort to impeach appellant's testimony." Respondent does not dispute this was misconduct. We conclude the prosecutor's previously quoted comments during jury argument constituted misconduct. (Cf. *Hill*, *supra,* 17 Cal.4th at pp. 827-828; *People v. Hall* (2000) 82 Cal.App.4th 813, 817.)[10]

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10 *Hall* stated, "[t]his was not a situation in which the prosecutor was drawing inferences from testimony heard by the jury. The prosecutor, in the guise of closing argument, told the jury what the testimony of an uncalled witness would have been, thus

3. *The Prosecutor's Misrepresentations About The Disk "Snuck" Into The Briefcase.*

a. *Pertinent Facts.*

Appellant testified during direct examination that, the night before he was terminated, he took a NRB backup "disc." That "diskette" was the oldest of seven backup discs, and contained information concerning amounts owed to clients. According to the reporter's transcript, appellant testified, "I took the oldest backup diskette, *stuck* it in my briefcase, and waited for my son." (Italics added.) When appellant's son arrived, appellant secured the office.

During cross-examination, the prosecutor repeatedly indicated that appellant had testified concerning the disc that appellant *snuck* it in his briefcase, and the prosecutor repeatedly cross-examined appellant concerning why he had done so. Appellant denied testifying he snuck the disc into his briefcase, and testified that if he had so testified, he meant only that he took it. During opening and closing argument, the prosecutor repeatedly indicated that appellant snuck the disc into appellant's briefcase, and the prosecutor related that issue to appellant's intent to steal.

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implying that he decided not to call [the uncalled witness] . . . after determining that his testimony would have been the same as and corroborative of . . . testimony [of a testifying witness]. This tactic denied appellant his Sixth Amendment rights to confront and cross-examine an uncalled prosecution witness. Therefore, reversal is required unless we are satisfied beyond a reasonable doubt that the misconduct did not affect the jury's verdict. (*People v. Harris* (1989) 47 Cal.3d 1047, 1083 . . . ; *People v. Gaines* (1997) 54 Cal.App.4th 821, 825.)" (*People v. Hall*, *supra,* 82 Cal.App.4th at p. 817.)

b. *Analysis.*

Hill stated, "Although prosecutors have wide latitude to draw inferences from the evidence presented at trial, mischaracterizing the evidence is misconduct. [Citations.] A prosecutor's 'vigorous' presentation of facts favorable to his or her side 'does not excuse either deliberate or mistaken misstatements of fact.' [Citation.]" (*Hill*, *supra,* 17 Cal.4th at p. 823.)

Although we will not detail them here, we have reviewed the repeated instances, cited by appellant, in which the prosecutor, during both cross-examination and jury argument, referred to the alleged fact that appellant testified that he "snuck" the disc into his briefcase. The reporter's transcript, however, reflects that appellant testified that he "stuck" the diskette in his briefcase. Respondent concedes "it appears the prosecutor was mistaken and confused 'snuck' with 'stuck.'"[11] Respondent also concedes that, under *Hill* and other California Supreme Court authority, "a mistaken and vigorous argument technically may constitute 'misconduct.'" The prosecutor's mischaracterization of appellant's testimony was misconduct. (*Hill*, *supra,* 17 Cal.4th at p. 823.)

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11 We note respondent has not moved for an order correcting the record. (See Cal. Rules of Court, rule 12(c)(1).)

4. *Improper Disparagement Of Defense Witnesses.*

Appellant claims the prosecutor improperly disparaged defense witnesses. We agree. As mentioned, it is the duty of every member of the bar to maintain the respect due to the *courts* and to abstain from *all offensive personality*. (Bus. & Prof. Code, § 6068, subds. (b) and (f).) (*Hill*, *supra,* 17 Cal.4th at p. 819.) *Hill* also stated, "[p]rosecutors who engage in *rude or intemperate behavior*, . . . greatly demean the office they hold and the People in whose name they serve." (*Hill*, *supra,* 17 Cal.4th at p. 820, italics added.)[12]

In *People v. Espinoza* (1992) 3 Cal.4th 806, the court stated, a "prosecutor's *rude and intemperate behavior* violates the federal Constitution when it comprises a *pattern* of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' [Citations.] But conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"the use of deceptive or *reprehensible* methods to attempt to

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12 *Hill* further observed, "The American Bar Association Project on Standards for Criminal Justice, Standards Relating to The Prosecution Function and The Defense Function (Approved Draft 1971) (hereafter ABA Standards), sets forth the standard of courtroom behavior required for a prosecutor: '5.2 Courtroom decorum. [¶] (a) The prosecutor should *support the authority of the court and the dignity of the trial courtroom by strict adherence to the rules of decorum and by manifesting an attitude of professional respect toward the judge*, opposing counsel, *witnesses, defendants*, jurors and others in the courtroom. [¶] (b) When court is in session the prosecutor *should address the court, not opposing counsel*, on all matters relating to the case . . . .' Commentary to this section further states: 'The gravity of the human interests at stake in a criminal trial demands that the proceeding be conducted in an orderly and dignified manner . . . . [¶] *Rudeness and intemperance have no place in any court*, . . .' (ABA Standards, *supra,* com. to std. 5.2, pp. 113-114; see generally, *People v. Kelley* (1977) 75 Cal.App.3d 672, 688 . . . [quoting ABA standards].)" (*Hill*, *supra,* 17 Cal.4th 832-833, italics added.)

persuade either the court or the jury."' [Citations.]" (*People v. Espinoza*, *supra,* 3 Cal.4th at p. 820, italics added.)

Appellant, in pages 19 through 22 of his opening brief, cites numerous instances of alleged prosecutorial misconduct. We will not detail their context here or, in particular, the comments by the court or appellant's counsel about the alleged misconduct; suffice it to say we have read each alleged instance in its context in the record and have concluded that the following prosecutorial remarks constituted prosecutorial misconduct. We address each instance in the order in which it is presented in appellant's opening brief. Although, as we later discuss, an individual instance might have been harmless, the instances, considered collectively, were prejudicial.

During the prosecutor's cross-examination of Cravonne Barrett, appellant's son, the prosecutor told Cravonne that certain testimony he had given was "a bunch of nonsense, because you don't know anything about what you're talking about because you weren't there." The prosecutor also told him that he did not "know anything about what [Cravonne] just said." These comments were rude, intemperate, and reprehensible.

The prosecutor told Cravonne "*we* believe you don't know what your father did." (Italics added.) This was rude, intemperate, and reprehensible. It also constituted an improper expression of the prosecutor's personal belief as to the reliability of a witness. (See *People v. Gates* (1987) 43 Cal.3d 1168, 1188.) Later, after Cravonne responded to a question posed by the prosecutor, the prosecutor replied, "*Thank you for that advertisement*. Let me ask you the third time." (Italics added.) This was rude, intemperate, unnecessarily sarcastic, and reprehensible.

After the court told the prosecutor what Cravonne had said during a portion of his testimony, the prosecutor replied, "Thank you. *May I rely to* [*sic*] *the court now to clarify these answers*?" (Italics added.) This was rude, intemperate, unnecessarily sarcastic, a display of utter lack of respect for the court and proper courtroom communication, and reprehensible.

In an exchange between the prosecutor and appellant's counsel during the prosecutor's cross-examination of Ceylonya Ewell, a defense witness, the prosecutor addressed appellant's counsel instead of the court in an effort to complain to appellant's counsel that appellant's counsel was allegedly giving hand signals to Ewell concerning how she should testify, a charge appellant's counsel vehemently denied. Despite the court's directive to the prosecutor not to address appellant's counsel, the prosecutor told appellant's counsel, "this case ain't the end of the world." The prosecutor's behavior was rude, intemperate, unnecessarily sarcastic, a display of utter lack of respect for the court and proper courtroom communication,[13] and reprehensible.

Several instances of misconduct occurred during the prosecutor's cross-examination of appellant. At one point, the prosecutor asked appellant, "What's so hard with just saying 'yes'?" On another occasion, the prosecutor asked appellant, "Did you finish your narrative?" Both comments were rude, intemperate, unnecessarily sarcastic, and reprehensible.

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13 We note that *Hill* observed that one of the ABA standards was, "When court is in session the prosecutor should address the court, not opposing counsel, on all matters relating to the case." (*Hill*, *supra,* 17 Cal.4th p. 832.)

Later, the prosecutor told the court, concerning certain testimony by appellant, "I think he obfuscated the best he could." This was, again, misconduct regarding witness reliability. (Cf. *People v. Gates*, *supra,* 43 Cal.3d at p. 1188.)

Subsequently, the prosecutor told appellant, "I don't want to lose my temper with you, Mr. Barrett." This comment, an apparent attempt to intimidate appellant, was misconduct. (See *Hill*, *supra,* 17 Cal.4th at p. 835.)[14]

At one point, the prosecutor told appellant, "Mr. Barrett, the fact you misconstrued my question to the jury for your answer does not change my question."[15] (*Sic*.) The comment was rude, intemperate, unnecessarily sarcastic, and reprehensible. At a later point, the prosecutor asked appellant to look for a certain document in his files at home "since you have so many files, . . ." The comment was rude, intemperate, unnecessarily sarcastic, and reprehensible.

Later, the prosecutor asked appellant, "Let me ask you this: does Mr. Smith, Mr. Ford, Oasis Technology or anybody else on *planet earth*, have any percentage

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14 Concerning a similar issue, *Hill* stated, "'Governmental interference violative of a defendant's compulsory-process right includes, of course, the intimidation of defense witnesses by the prosecution. [Citations.] [¶] The forms that such prosecutorial misconduct may take are many and varied."

15 Moreover, in context, appellant had not misconstrued the prosecutor's question; instead the prosecutor had not focused on what he had asked. We note that sometimes the prosecutor insinuated appellant had not answered a previous question, when in fact the prosecutor had not remembered his previous question. On one occasion during appellant's cross-examination, for example, the prosecutor asked appellant "*How* did you respond to [Teresa's letter to appellant]? After appellant replied, the prosecutor asked, "How does anything you just said answer the question: *Did* you respond to Teresa Smith regarding her letter?"

interest in this [book] should it ever be published by you?" (Italics added.) The comment was rude, intemperate, unnecessarily sarcastic, and reprehensible.

Still later, the prosecutor audibly laughed during appellant's redirect examination of Dwayne Simon, a defense witness. (See *Hill*, *supra,* 17 Cal.4th at p. 834 ["[o]ther disturbing incidents include [the prosecutor's] audibly laughing in the middle of [defense counsel's examination of two witnesses] . . . ."].)

Finally, at one point while appellant was testifying, the prosecutor asked, "At this time, your Honor, are we going to have a question and answer, *or just shall we just [sic] get popcorn for this*?" (Italics added.)

The above discussion reveals a pattern of prosecutorial misbehavior rife with rudeness and intemperate remarks, offensive personality, gratuitous sarcasm, utter lack of respect for the court and courtroom procedure, improper expressions of personal belief concerning witness reliability, statements to defense counsel instead of to the court, an apparent attempt to intimidate appellant, and childish laughing during defense examination. We conclude the prosecutor committed numerous acts of misconduct under both federal and state standards. (Cf. *Hill*, *supra,* 17 Cal.4th at pp. 819-820, 823, 827-828, 832-833; *People v. Espinoza*, *supra,* 3 Cal.4th 806, 820; *People v. Gates*, *supra,* 43 Cal.3d at p. 1188.)

5. *The Above Prosecutorial Misconduct Was Prejudicial*.

It remains to assess the prejudice, if any, resulting from the misconduct found in parts two, three, and four, *ante*. Again, the settled standards are enunciated in *Hill*.[16]

Appellant was convicted of grand theft under a theory of theft by larceny. The parties' briefs do not specify what property was stolen by appellant. However, it appears that the People elected to prosecute appellant based solely on his taking of *the DM and backup tape* recovered by Ingram from appellant's office in his home.[17] Moreover, the

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[16] *Hill* observed that "Lengthy criminal trials are rarely perfect, and this court will not reverse a judgment absent a clear showing of a miscarriage of justice. (Cal. Const., art. VI, § 13; see also *Chapman v. California* (1967) 386 U.S. 18, 24 . . . [harmless-beyond-a-reasonable-doubt standard applies to review of federal constitutional error].) Nevertheless, a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." [Citations.] (*Hill*, *supra,* 17 Cal.4th at pp. 844-845.) For example, in *Hill*, the Supreme Court stated, "[i]n the circumstances of this case, the sheer number of instances of prosecutorial misconduct and other legal errors raises the strong possibility the aggregate prejudicial effect of such errors was greater than the sum of the prejudice of each error standing alone." (*Id*. at p. 845.)

[17] During opening statement, the prosecutor referred to appellant's taking of the DM and other items such as client files. However, after indicating that the evidence would show that appellant was an NRB employee and not an owner or partner, the prosecutor stated, "And the only reason we get to this . . . is because of what he said when the *items were recovered from his home* approximately one month after he was fired from the business." (Italics added.) We note that the only items recovered from appellant's home were the DM and backup tape. Later discussing anticipated evidence that appellant was merely a collections manager, the prosecutor stated, ". . . why we even get into that is that shows he has no defense of being who he claimed to be when he was *caught redhanded with the goods*. The bottom line is *he took $8,000 worth of the company's properties* along with client files, but that's a civil thing; or, you know, people take the goodwill of the business and go and make claims about the current owners of the company so they can go and get the business. That's a collateral issue. [¶] The issue before you is 'Did he take the $8,000 worth of proprietary software that ran that company when he was terminated?' [¶] The answer is 'Yes.' That's beyond a reasonable doubt. [¶] And the

People's theory, as reflected in their jury argument, appears to have been that appellant took the DM and backup tape (along with clients' files) when he left NRB on August 15, 2001, the day before he was fired.[18] Further, the People reasonably could have been

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question will go from there, 'Did he have any right to take that?' [¶] And the answer is 'No.'" (Italics added.) Fairly read, the above quoted comments indicate that the criminal prosecution pertained to the DM and backup tape with which appellant was caught "redhanded" in his home, while, according to the prosecutor, client files and goodwill issues were a civil matter and collateral. The prosecutor concluded his opening statement by telling the jury that there would "be no doubt . . . that, . . . Mr. Barrett *stole the company property in which* [*sic*] *he was found to be in possession in September of last year*." (Italics added.)

Similarly, the evidence presented at trial, the People's opening argument, and appellant's argument concerning items appellant allegedly stole was wide-ranging (perhaps unnecessarily so) and pertained to both the DM and various clients' files. However, the prosecutor, during closing argument, indicated appellant was being prosecuted for his *theft of the DM and backup tape*, and not for stealing files. Specifically, the prosecutor urged during closing argument that "*This case is not about the files. He's not charged with stealing the files*." (Italics added.) Moreover, when, during closing argument, the prosecutor discussed grand theft by embezzlement and its elements of entrustment and intent to deprive, and related that law to the evidence presented, the only property he discussed as embezzled was the DM. Further, when, concluding his closing argument, the prosecutor discussed the alternative theory of theft by larceny and its elements of taking and intent to deprive, the record, fairly read, reflects that the only property he specifically discussed as being stolen was the "back-up tape, ca [*sic*] tapes" that NRB would have to use to reboot its system in the event of a system failure, that is, apparently, the DM backup tape, although the prosecutor commented that appellant stole "other items as well."

Respondent not only fails to discuss the prosecutor's apparent election of offenses, but asserts appellant was prosecuted for the theft of files. In support of respondent's argument that the prosecutor's references to Kimberly Hill were not prejudicial, respondent asserts, "There was no real dispute about appellant having taken the missing client files, . . ." In support of respondent's argument that the prosecutor's alleged improper disparagement of witnesses was not prejudicial, respondent asserts, "Appellant had taken property which belonged to Anthony Davis and his company. He took clients from NRB to his new job."

18 During rebuttal argument, the People, discussing the theory of theft by embezzlement, urged that appellant took the "Debt Master software" *with specific intent to deprive another of property*. As to that intent, the People urged that appellant "wanted

understood as urging to the jury that the "snuck" disc *was* (or was part of) the DM software for the theft of which the People elected to prosecute appellant.[19]

In short, although appellant testified he "stuck" the disc into his briefcase, the People, mischaracterizing his testimony by urging that he used the word "snuck,"

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to download the entire database," and that appellant claimed he did so "to protect the debtor account owners, . . ." However, the evidence was that appellant entertained that intent the day before he was fired, accordingly, the jury reasonably could have understood the People to be urging that appellant took the DM and backup tape the day before he was fired. The People later urged appellant did not know that he needed a key to make that software work. The People then asked, "[s]o where does he *put it after he left* the company? He puts it in a Tupperware container upstairs in his office . . . . It is an ongoing theft, and the theft never stopped until it was taken by Detective Ingram." Thus, the People reasonably could have been understood to urge that appellant took the *DM* (which needed such a key) and backup tape *the day before he left the company*, and *later* put it in the Tupperware. After commenting on the theft by embezzlement of the DM as indicated above, the People later discussed the theory of theft by larceny, urging that appellant took "the property" with intent to steal because he knew that NRB would need the "backup tape, ca [*sic*] tapes" (*sic.*) to reboot in the event of a system failure at NRB. The People urged that appellant's "intention was clearly to deprive them of their property *when he left* and he left under the color of darkness, stealing other items *as well*." Thus, the People reasonably could have been understood to argue that appellant sold the DM backup tape *and* other items.

[19] This is true since, inter alia, the People urged appellant "snuck" the disc into his briefcase the day before he was fired, the People's argument related the taking of the snuck disc to appellant's defense of claim of right, and the People indicated he needed a key (as was the case with the DM) to operate the snuck disc. Thus, during closing argument, the prosecutor urged that appellant stole the snuck disc and "got the call to meet Anthony Smith the next day." The prosecutor also urged, "Mr. Barrett told you in his direct testimony in response to an answer by his attorney the only thing he snuck out of the office on August 15th was that c tape [*sic*] drive and he put it in his briefcase, and I confronted Mr. Barrett about his words, and I said who was there when you had to sneak it in your briefcase? And then we had that discussion about snuck, and then he finally agreed. This snuck means taking without permission. I would say snuck means taking without other people knowing. When you sneak something you're not taking something *openly and avowedly*, are you?" (Italics added.) The prosecutor further urged that appellant took the snuck disc with a motive to destroy NRB, "taking away from that if he had that net sentinel key." Again, such a key was needed to operate the DM.

erroneously implied appellant's consciousness of guilt with respect to that disc, and, therefore, erroneously implied appellant's theft of that disc, and the jury reasonably could have understood the prosecutor to urge that that disc was the DM, the very property for the theft of which the People apparently had elected to prosecute appellant. We note in this regard that, despite the wide-ranging presentation of evidence concerning theft, including the evidence of theft of clients' files, the jury, during its deliberations, apparently focused on the theft of the "missing disk."[20]

The prosecutor's mischaracterization of appellant's testimony (see part three, *ante*), which may well have gone to the heart of this case, could by itself justify reversal of the judgment. However, there is no need to decide that issue. In assessing prejudice, we consider that misconduct in the context of the implications of respondent's concession that appellant has not waived on appeal the issues of prosecutorial misconduct (see part 1, *ante*) as well as in the context of the prosecutor's misconduct regarding references to

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20 During deliberations, the jury sent a note to the court, asking, inter alia, (1) whether appellant could be convicted of "grand theft w/out embezzlement[]"; and (2) whether appellant was "specifically 'entrusted' to keep the missing computer disk[.]" The court answered the first question in the affirmative. As to the second question, the court told the jury that the issue involved a question of fact for the jury to determine. Appellant was subsequently convicted of only grand theft.

The problem presented by the prosecutor's mischaracterization of appellant's testimony by the prosecutor's use of the word "snuck" is compounded by the fact that, although the prosecutor apparently elected to prosecute appellant based on his theft of the DM, the prosecutor commented that appellant stole other items as well. The defense evidence was that the DM had been in appellant's home for months and, the night before he was fired, he took a separate computer disk. If the jury believed that defense evidence, but relied on the prosecutor's mischaracterization of appellant's testimony, the jury might have convicted appellant based on his alleged sneaking of a separate computer disk which was not the DM.

Kimberly Hill (discussed in part two, *ante*) and regarding improper disparagement of witnesses (discussed in part four, *ante*).[21]

We note, as to the prosecutor's improper disparagement of witnesses, that even the prosecutor acknowledged that his meanness during his cross-examination of appellant adversely impacted jurors.[22] The Attorney General himself, in respondent's brief, quotes extensively from *Hill*'s discussion of the elevated standard of conduct applicable to

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[21] The showing of prejudice may have been weakened in this case, however, by the fact that appellant's claim of right defense (which appellant concedes was his sole defense) may not have been viable. Just as a defendant's status as a partner will not negate intent to steal partnership property because that status does not negate an intent to steal the defendant's partner's property interest (*People v. Kahanic* (1987) 196 Cal.App.3d 461, 464-465), arguably a claim of right based on a defendant's *claimed* status as a partner does not negate an intent to steal the defendant's partner's property interest. The claim of right defense is set forth in Penal Code section 511. The section "may be read as providing a statutory claim-of-right defense to all theft-related charges, . . ." (*People v. Tufunga* (1999) 21 Cal.4th 935, 952-953, fn. 4.) However, "'[s]ection 511 is predicated upon an avowed claim in good faith of the *entire* title to the property appropriated'" (*People v. Stewart* (1976) 16 Cal.3d 133, 139 (*Stewart*), quoting *People v. Holmes* (1910) 13 Cal.App. 212, 216-217, italics added), and a claim of right defense based on a claimed status as a partner may not be the requisite claim to the *entire* title to the appropriated property. Moreover, "'[w]hether a claim is advanced in good faith does not depend solely upon whether the claimant believes he was acting lawfully; the circumstances must be indicative of good faith.' [Citations.] For example, the circumstances in a particular case might indicate that although defendant may have 'believed' he acted lawfully, he was aware of contrary facts which rendered such a belief wholly unreasonable, and hence in bad faith.'" (*Stewart*, *supra,* 16 Cal.3d at p. 140.) In any event, there is no need to decide whether appellant's claim of right defense was viable or whether the requisite showing of prejudice from the prosecutor's misconduct was weakened by any lack of viability of that defense. We conclude that even if it was so weakened, reversal of the judgment is still compelled.

[22] Shortly after the commencement of his opening argument, the prosecutor commented, "You know, when I was cross-examining Curley Barrett, *some of you gasped at how mean I was*. I didn't need to be that way. What a mean man." (Italics added.) The prosecutor urged he was justified because the jury did not know "what was going to be demonstrated" by the time appellant's cross-examination had finished.

prosecutors, expressly *assumes* the prosecutor's "vigorous prosecution of this case fell within the kind of conduct proscribed in *Hill*," but urges that no prejudice occurred and, inter alia, "the allegedly inappropriate conduct was arguably more detrimental to the prosecution."

Although some of the instances of misconduct discussed in this decision might have been independently harmless, we hold that, based on the prosecutor's misconduct discussed in parts two, three, and four, *ante,* considered together, reversal of the judgment is required.[23]

DISPOSITION

The judgment is reversed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CROSKEY, J.

We concur:

KLEIN, P.J.

ALDRICH, J.

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[23] As a matter of guidance to the trial court in the event of retrial, we recommend that the trial court cause the trial record to reflect clearly the item(s) for the alleged theft of which appellant is being prosecuted; this would clarify the record, streamline the presentation of evidence, and help identify the purpose, limited or otherwise, for which evidence is admitted.